

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

KAREN BOWEN

**DALE BOWEN, on behalf of themselves and
all others similarly situated**

Plaintiff

~Vs~

COMPLAINT

MEL S HARRIS & ASSOCIATES LLC

Defendants

JURY TRIAL DEMANDED

Albany County }

New York State } ss:

KAREN BOWEN & DALE BOWEN, the plaintiffs, complain of the defendant by alleging and showing that:

NATURE OF ACTION

1. This is an action to enforce the Fair Debt Collection Practice Act 15 USC §1692 et seq, (FDCPA) and New York State General Business Law §349 and related claims.

JURISDICTION AND VENUE

2. This Court has federal question jurisdiction under 15 USC §1692k (d) and 28 USC §1331. The Court has supplemental jurisdiction per 28 USC §1337 to hear and adjudicate plaintiff's state law claims.

3. Venue is proper in this district per 28 USC §1391 (b), as the acts and transactions that give rise to this action occurred, in substantial part, in this district. Venue is also proper in this district because plaintiff lives in this district, defendants transact business in this district and the acts complained of happened in this district.

PARTIES

Plaintiffs

4. At all relevant times:

- a. The plaintiffs, Karen and Dale Bowen, reside in Copenhagen, Lewis County, New York State, within this district, and
- b. Each plaintiff is a "consumer" as that term is defined in the FDCPA, in that each is an individual who allegedly owes a debt to another. Each plaintiff is a "consumer" as that term is used in the New York State General Business Law 349.

Defendant

5. Upon information and belief, at all relevant times, the defendant **Mel S Harris & Associates LLC**:

- a. Is a limited liability company organized and existing under the laws of New York, with a principal place of business at New York, New York.
- b. Is a "debt collector" as that term is defined in the FDCPA;
- c. Transacts business in this district;

- d. Is regularly engaged, for profit, in the collection of defaulted consumer debt from the holders of such debt for others by use of the mail, telephone, or the courts of the State of New York and other means of interstate commerce.

FACTUAL ALLEGATIONS

6. On or about 3/16/07 MSH took a default judgment against plaintiffs in the Supreme Court for Lewis County in a consumer credit transaction on behalf of LR Credit 11 LLC. It was alleged LR Credit owned a Direct Merchants Bank credit card in the Bowens' names that they had defaulted on in 2003.
7. A true copy of the docket is attached at Exhibit 1.
8. The debt, whether or not plaintiffs owe it, is an obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, hence is a "debt" as defined by the FDCPA.
9. On or about 11/22/11, plaintiffs received a letter ("Letter") from MSH telling us , essentially, that it would vacate the judgment against us if we signed a stipulation (" stip").
10. A true copy of the Letter and Stip are attached as Exhibits 2 and 3, respectively.

11. As plaintiffs are informed and believe, MSH sent them the Letter and Stip pursuant to an "Assurance of Discontinuance pursuant to Executive Law 63(15)" ("Assurance") entered into between MSH and the Office of the Attorney General on or about 5/2/11.
12. A true copy of the Assurance is attached to this as Exhibit 4 and its content is incorporated by reference.
13. Among the findings recited by the Attorney General in the Assurance ¹ was that MSH employed a process server, We Serve it for You Process Serving Agency LLC, to whom MSH referred 38, 258 legal papers for service in consumer credit transactions in New York State from 2007 to 2009. MSH used the affidavits of service from the Agency to obtain default judgments against consumers. However, the Attorney General believed more than half of those affidavits were or could be false, infecting the defaults obtained. ²
14. The judgment obtained against plaintiffs on 3/16/07 was obtained, as plaintiffs are informed and believe, in the manner criticized by the Attorney General.

¹ but not admitted to by MSH

² Ex 4, ¶¶ 14-24, of which we ask the Court to take Notice

15. The Letter contained a preface in underlined, bold-face, capital -letter print as follows:

"THIS OFFICIAL LETTER IS BEING SENT TO YOU AT THE DIRECTION OF THE NYS OFFICE OF COURT ADMINISTRATION AND NYS ATTORNEY GENERAL ERIC T SCHNEIDERMAN"

16. In fact, the Office of Court Administration had nothing to do with the Assurance or the Letter.
17. In fact, as plaintiffs are now informed and believe, and contrary to the Letter's implication, the Letter was not issued by either the Office of Court Administration or the Office of the NYS Attorney General so it was not "official" in any sense of the word.
18. In fact, the Letter was the voluntary effort of MSH to avoid civil prosecution by the Attorney General.
19. The Letter said that if plaintiffs signed the Stip, MSH could sue plaintiffs again for the same debt.
20. The Letter also said that if plaintiffs did not sign a Stip, the judgment would stand.

21. The Letter did not say that that plaintiffs had the independent right to ask the Court to vacate the judgment or that plaintiffs had additional rights to do so under CPLR §5015(a), CPLR §317 and CPLR §5015(d).
22. The Letter did not say that if plaintiff exercised those rights they might avoid a second lawsuit.
23. The Letter did not say that by signing the stip plaintiffs would be waiving a statute of limitations defense in a second lawsuit or waiving a defense under CPLR 205.
24. Defendants failed to disclose these rights in the Letter even though they knew, and were in the better position to know, that consumers like the named plaintiffs had other ways to deal with the judgment besides signing the stipulation.
25. With the Letter dressed as " official", and without disclosure of these additional rights in the Letter the consumer- least sophisticated and otherwise,- was led to believe the only way to vacate the judgment was to sign the stipulation (with all its implications) and face a second lawsuit.

26. MSH, as plaintiffs are informed and believe, sent the Letter and Stipulation in the same form to thousands of other consumers within this District.
27. Because MSH faced the plaintiffs with an "all or nothing" proposition, plaintiffs signed the Stip.
28. In reliance on MSH's promise to vacate the judgment, plaintiffs signed the Stip.
29. A true copy of the Stip the plaintiffs signed and returned to MSH is attached as Exhibit 3.
30. On or about 1/4/12, MSH then represented to plaintiffs that it had vacated the judgment.
31. Thereafter Dale Bowen applied for a business loan from Watertown Savings Bank in the amount of \$15,000 to purchase a wood processor for his wood product business.
32. Plaintiffs had a preexisting banking relationship with Watertown Savings Bank.

33. However, MSH had not vacated the judgment as it claimed.
34. As a result, on or about 3/5/12, the Bank denied Dale Bowen his business loan and , as plaintiffs are informed and believe, the Bank would have given him the loan but for the judgment.
35. At a time between 3/5/12 and 4/25/12, Dale Bowen called MSH to ask why the judgment had not been vacated as promised. He spoke to Shelby Benjamin, an attorney with MSH, who told Mr. Bowen she would have someone call him back. At a time and by a person better known to MSH, a man from MSH called Dale Bowen. Mr. Bowen asked why the judgment had not been vacated as promised. The man responded it was being handled differently, or words to that effect. When Mr. Bowen asked him why it was being handled differently, the man said, in a derisive and menacing tone, "Because you (Bowen) don't have the brain capacity to understand we are suing you for money your wife welshed on" or words to that effect. After being shocked by these words, Mr. Bowen hung up. As we are informed and believe, the man Dale Bowen talked with is an employee of MSH and was acting in the normal course of his employment.

36. On or about 4/25/12 MSH "re-served" the plaintiffs with a copy of the summons and complaint .
37. In fact, the judgment was not vacated at that time.
38. In fact, the judgment was not actually vacated until July 2012, *after* MSH had sued the plaintiffs a second time and then only *after* plaintiffs hired a lawyer.
39. Defendant's actions were at all times herein intentional, knowing, and persistent.
40. Plaintiffs became increasingly angry, anxious, abused, annoyed, compromised, confused, humiliated, worried and bothered, feelings which have continued from 11/21/11 to this day.

CLASS ALLEGATIONS

41. The plaintiffs, Karen Bowen and Dale Bowen, bring this action on behalf of all others similarly situated as a class action pursuant to Fed. R. Civ. P. Rule 23, as it relates to Count 1 and Count 3, on behalf of two classes of all other persons similarly situated.

42. Plaintiffs seek to represent the first class (the "Letter class") consisting of all persons who satisfy the following criteria:

- (i) residents of the Northern District of New York;
- (ii) who were identified by MSH per paragraph 28 of the Assurance;
- (iii) who received the Letter and stip;
- (iv) during the one year period prior to the filing of the complaint in this action.

43. Plaintiffs seek to represent the second class (the "false vacatur class") consisting of all persons who satisfy the following criteria:

- (i) residents of the Northern District of New York ;
- (ii) who were identified by MSH per paragraph 28 of the Assurance;
- (iii) who signed and returned the Stip to MSH in a timely manner;
- (iv) but whose judgments were not vacated by MSH at any time;
- (v) during the one year period prior to the filing of the complaint in this action

44. On information and belief, each class includes thousands of members and is sufficiently numerous that joinder of all members is impractical.

45. There are questions of law and fact common to each class, which common issues predominate over any issues peculiar to individual class members.

The principal common questions include:

- a) whether MSH made a false, misleading and/or deceptive statements in the so-called "official Letter" in its collection of a debt from plaintiff and other consumers like plaintiff ;

- b) whether MSH intended to vacate the judgments;
 - c) whether such false, misleading and deceptive acts were knowingly made and /or intentional; and
 - d) whether such false, misleading and deceptive acts were material in nature.
- 46. The plaintiff's claims are typical of the claims of the other members of each class. All of the claims are based on the same factual and legal theories and plaintiffs, together with each class member, have been subjected the same false and deceptive communications and acts by MSH and all have been damaged in the same manner.
- 47. These plaintiffs will fairly and adequately represent the interests of the class members. Plaintiffs have retained counsel experienced in prosecuting class actions and in consumer protection matters. There is no reason why these plaintiffs and their counsel will not vigorously pursue this matter. Plaintiffs have no interests adverse to those of any of the other class members.
- 48. Certification of these classes pursuant to Fed. R. Civ. P. Rule 23(b)(3) is appropriate. A class action is the only appropriate means of resolving this

controversy because the class members are not aware of their rights. A failure of justice will result without a class action,. Class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy presented by this complaint.

49. Certification of these classes under Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate in that MSH has acted on grounds generally applicable to each class , so the making of declaratory relief with respect to the classes as a whole is appropriate.

COUNT 1

(Violation of the Fair Debt Collection Practices Act)

50. Plaintiffs repeat the allegations of the preceding paragraphs.
51. MSH acts of sending the Letter in its form and the Stip, violate the FDCPA because:
 - i. The Letter deceives and seeks to mislead the debtor by falsely stating it was an "official " letter sent or issued or authorized by two state agencies when , in fact, it was not, in violation of 15 USC §§ 1692e , 1692e(1), 1692e(2)(A), 1692e(9), 1692e(10), 1692e(14), and 1692f,
 - ii. MSH designed and furnished the Letter in its form knowing the Letter would be used to create the false belief in a consumer-debtor

that a person other than the creditor of such consumer, i.e., the Office of Court Administration and the Office of the Attorney General, was participating in the collection of or in an attempt to collect the debt such consumer allegedly owes MSH's client, when in fact those two agencies were not so participating. in violation of 15 USC 1692j (a);

- iii. The Letter deceives and seeks to mislead the debtor into signing the Stip without disclosing that the debtor had an independent recourse to vacate the judgment, in violation of 15 USC §§ 1692e, 16923(2)(A), 1692e(10) and 1692f;
- iv. the Letter seeks to deceive and mislead by promises that if the debtor signs the stip MSH will have the default judgment vacated, when MSH had no intention of doing so, in violation of 15 USC §§ 1692e, 1692e(5) and 1692(10) and 1692f

COUNT 2

(Violation of the Fair Debt Collection Practices Act - harassment)

- 52. Plaintiffs repeat the allegations of the foregoing paragraphs.
- 53. The acts of MSH's employee in the phone call referred to in paragraph 35 of saying Dale Bowen "lacked the mental capacity to understand" what was going on was abusive in violation of 15 USC 1692d.

COUNT 3

(Violation of New York State General Business Law §349)

- 54. Plaintiffs repeat the allegations of the foregoing paragraphs .

55. Defendant has acted with a pattern and practice of deception in its business pursuit of collecting consumer debts from plaintiffs and thousands of others like plaintiff who reside in the district following defendant's execution of the Assurance with the Attorney General with its use of the Letter and Stip .
56. Such acts, i.e., calling without telling him/her of the other avenues of relief available.
1. Such acts, i.e., the Letter "official " and invoking the OCA and OAG when in fact neither agency had anything to do with the Letter, designing and disseminating the Letter in its form with the intent to deceive plaintiffs and affected consumers like plaintiffs into thinking the OAG and OCA were participating in the collection actions against them when, in fact, they were not, inducing plaintiff and other consumers like plaintiff to sign the stip by not advising them of the other rights plaintiffs might have under law to attack or defend the judgment , by inducing plaintiff and other consumers like plaintiff to sign the Stip with a promise to vacate the judgment if they did when MSH had no intention of actually doing so or failing to take the steps necessary to do so, thus , creating a false , misleading and deceptive position that the only avenue of relief from the default judgment infected by the acts of MSH's process server was to sign the Stip when MSH knew or was in the better position to know plaintiff and other consumers had other ways to do so, are false and/or deceptive in a material way as MSH could not otherwise collect money for their clients from the consumers MSH identified to the OAG in the Assurance without them, and their effect is to dupe consumers into defending unnecessary lawsuits by waiving certain rights and giving up others, thus are material practices of deceit.

57. Such deception by MSH was, on information and belief, knowing and intentional.
58. Such deception happened , as plaintiffs are informed and believe, every time MSH sent out the Letter in this district.
59. Plaintiffs , and others who have received or acted on letters like the Letter sent from MSH have been damaged.

COUNT 4

(Breach of Contract)

60. Plaintiffs repeat the allegations of the foregoing paragraphs.
61. The Stip was a contract between MSH and these plaintiffs.
62. As stated above, MSH offered to have the default judgment from 2007 vacated in consideration of the plaintiffs; signing the stip and thus agreeing to be sued a second time, this time by mail.

63. Relying on MSH's promise to vacate the judgment, the plaintiffs signed the Stip and received a summons and complaint in April 2012.
64. However, MSH breached the Stip by failing to have the judgment vacated.
65. As a result, the plaintiffs suffered actual and consequential damages in that 1) they had to hire a lawyer in order to get a vacatur of the judgment, and 2) Dale Bowen lost a business loan and the opportunities that sprung from that loan because the judgment appeared of record after the time MSH had represented to the plaintiffs it had vacated the judgment.

JURY DEMAND

I ask for a trial by jury of all issues

WHEREFORE, we ask the Court for judgment:

- a. declaring MSH's actions in violation of the FDCPA and New York State General Business Law §349;
- b. awarding plaintiffs actual damages and statutory damages against the defendant on Counts 1 and 2 per 15 USC §1692k;
- c. awarding plaintiffs actual, statutory damages and punitive damages against the defendant per GBL §349;
- d. awarding plaintiffs actual and consequential damages in an amount determined at trial on Count 4
- e. awarding plaintiffs costs and disbursements of this action, and reasonable attorney's fees as allowed by law; and
- f. such other, further and different relief as the Court finds proper here.

DATED: November 18, 2012

s/ Anthony J Pietrafesa

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VERIFICATION

New York State)
Albany County) ss:

Karen Bowen and Dale Bowen , being duly sworn, deposes that: We are the plaintiffs this action, we have read the complaint and the factual allegations contained in the complaint are true to our personal knowledge except for those alleged on information and belief, and as to those allegations we believe them to be true.

s/ Karen Bowen

Karen Bowen

s/ Dale Bowen

Dale Bowen

Sworn to and Subscribed
Before me on 11/18/2012

s/ Anthony J. Pietrafesa

Anthony J. Pietrafesa-Notary Public
Qualified in Albany County 02PI6157974
My Commission expires 11/20/2014